IN THE

Supreme Court of the United States

NO. 130

OCTOBER TERM, 1928.

OLD COLONY TRUST COMPANY, ET AL.,
Executors,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Certificate From the United States Circuit Court of Appeals for the First Circuit.

BRIEF AS AMICUS CURIAE BY LEAVE OF THE COURT.

I.

IS THERE, AS A MATTER OF LAW, A PETITION FOR REVIEW OF A DECISION OF THE BOARD OF TAX APPEALS OF WHICH AN APPELLATE COURT WILL OR SHOULD TAKE JURISDICTION?

Considering this question we must first determine—

WHAT THE BOARD OF TAX APPEALS IS.

"The statute leaves no room for doubt as to the solemn nature of the function of the Board. It is not merely a newly created higher division of the Bureau or even of the Treasury Department. It is, in the language of the statute, 'an *independent agency*

in the executive branch of the government.' * * * Witnesses are to be heard, and if necessary compelled by subpoena to testify; oaths are to be administered; papers and books introduced in evidence, and depositions taken. These are not the attributes of an administrative office. They give us the picture of a judicial tribunal."

Speech of Hon. Chas. D. Hamel, former president of the Board of Tax Appeals, on Sept. 12, 1924, in Detroit, Mich.

"The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer."

p. 17, Report of Committee on Ways and Means of the House on the Revenue Bill of 1926.

"The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer."

p. 34, Report of Senate Finance Committee on Internal Revenue Bill of 1926.

"It seems to me that the Board is at one of the milestones of its career. It has passed from the chrysalis of being a mere administrative agency of the Treasury Department, and has gotten along the road to its future status as a court, and whether it reaches the maturity of a full fledged butterfly depends wholly I think on the way that it comports itself in the immediate future. I have felt often as I have watched the functioning of the Board in its early stages that it had a little too much of the Bureau of Internal Revenue spirit about it, and I am speaking with full respect for that Bureau."

Extract of speech from Senator David A. Reed of the Senate Finance Committee at the dinner in honor of the members of the United States Board of Tax Appeals at the Willard Hotel, Washington, D. C. on May 26, 1926.

"The Board is an instrument of the Government, established to make inquiries and determinations between a citizen and his government in tax matters."

Chicago Railway Equipment Co. v. Blair, Com., U. S. C. C. A., 7th Circuit, decided July 2, 1927.

"The Board of Tax Appeals is a tribunal of limited jurisdiction, and its powers are strictly confined to those affirmatively vested in it by the Act under which it was enacted. * * * Its power over income tax deficiencies is restricted to the hearing of appeals from determinations made under Section 274."

Appeal of C. L. Green, 2 B. T. A. 149, June 24, 1925.

II.

JURISDICTION OF THE BOARD OF TAX APPEALS.

It is provided by section 274 (b) of the 1926 Act that the Commissioner cannot assess or collect by distraint or proceeding in court an alleged deficiency in tax or any part thereof disallowed by the Board. But nowhere, is there any jurisdiction conferred upon the Board to enforce the payment of any deficiency which it may find. The collection of the deficiency is solely in the hands of the Commissioner. The Board does not render a judgment, nor aid the Commissioner in any way.

The Board may determine an overpayment (sec. 284 (e) of 1926 Act) but is left without jurisdiction and

powerless to enforce such determination. By section 284 (d) (2) provision is specifically made for the bringing of suits by a taxpayer for the recovery of overpayments determined by the Board. So the Board is thus powerless to enforce its decisions of either deficiency due the United States or overpayment due the taxpayer.

Moreover, there are no statutory provisions as to how, by whom and from what funds the Board's determination of overpayments by taxpayers are to be made and met. As in decided contrast, note the specific statutory provision for payment of judgments awarded taxpayers by Federal Courts—

> *Payment of judgments of Court of Claims.*—In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. (R. S. s. 1089; Act Mar. 3, 1863, c. 92, s. 7, 12 Stat. 766).
>
> *Execution not to issue against officers of revenue in cases of probable cause.*—When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so re-

covered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (R. S. s. 989; Act Mar. 3, 1863, c. 76, s. 12, 12 Stat. 741).

III.

BOARD OF TAX APPEALS HAS NO JUDICIAL POWER TO COMPEL THE ATTENDANCE OF WITNESSES.

Nowhere, neither in the 1924, the 1926, or the 1928 Revenue Act, is any power conferred upon the Board of Tax Appeals to compel the attendance of witnesses. It is true that the Board has been given authority to issue subpoenas, (sections 908 and 909 of the Revenue Act of 1926, unchanged in the Revenue Act of 1928). But there is lacking the conferring of the judicial power to punish for contempt if the subpoena is flouted.

> "The Board has no power to punish or fine a person summoned before it or elsewhere by subpoena if he fails to honor such summons."
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> *Holmes and Brewster's Federal Tax Appeals*, (1927), p. 156.

It is true that section 1114 (a) of the Act of 1926 provides that it shall be a misdemeanor for any person to fail or refuse to supply information "for the purposes of the computation, assessment, or collection of any tax imposed by this act." Observe that it refers exclusively to tax imposed by the Act of 1926. Further, in any event, it is a criminal statute and could only be resorted to by information or indictment, together with a trial by jury in the proper Federal court. How can it be said that any tribunal, unable to compel the attendance of witnesses, is such a court from which there may be an appeal to the respective Circuit Courts of Appeal or the Supreme Court of the United States.

That the Board of Tax Appeals is without power to compel the attendance of witnesses is further confirmed by section 617 (a) of the Act of 1928. In this section specific jurisdiction to compel the attendance of witnesses is conferred upon the respective District Courts of the United States. It is significant that no similar jurisdiction is conferred upon the Board of Tax Appeals.

The history of the case of *Oesterlein Machine Co. v. Blair, Commissioner,* in the Supreme Court of the District of Columbia and in the Court of Appeals of the District of Columbia, (17 Fed. (2d), 663), and in the United States Supreme Court, decided Nov. 21, 1927, illustrates the impotency of the Board of Tax Appeals to compel the attendance of witnesses.

IV.

THE ATTITUDE OF THE FEDERAL COURTS RESPECTING THE EXTENT OF THE JURISDICTION OF THE BOARD OF TAX APPEALS.

In the case of *U. S. ex rel. McCandless v. Board of Tax Appeals,* October 14, 1927, the Supreme Court of the District of Columbia granted a peremptory writ of mandamus commanding the Board to proceed according to law in a number of particulars in which the Court held their actions were illegal. In *Mertz v. Mellon, Blair, Commissioner and Tait, Collector,* January 20, 1928, the same court enjoined the three defendants from attempting to force collection of an alleged deficiency determined by the Board in spite of the inhibition in section 3224 Revised Statutes. Regardless of the merits of these two decisions, they illustrate that the Federal Courts recognize that the Board is not a court proper and at least some distance from it.

V.

THE COMMISSIONER HAS POWER TO WITHHOLD JURISDICTION FROM THE BOARD OF TAX APPEALS.

By section 274 (a) of the 1926 Act, unchanged in the new Act, it is provided that the Board of Tax Appeals may not interfere with the Commissioner if he chooses to proceed under sections 279, 282 or 1001. Section 282 relates to bankruptcy or receivership cases and 1001 refers to cases of failure or neglect of the taxpayer to file a bond on appeal.

But section 279 provides (as very properly must be provided) that the Commissioner may proceed to immediate summary assessment and collection if he "believes that the assessment or collection of a deficiency will be jeopardized by delay". In such event the only way the jurisdiction of the Board can be resurrected is by the taxpayer filing a bond with the Collector "not exceeding double the amount" of the jeopardy assessment. The Commissioner, under this section 279, is given broad power to do just about anything he thinks is necessary. All of this is proper to protect the Government's taxes due. But the point is that it is thus within the power of the Commissioner, who is always one of the parties litigant before the Board, to deprive the Board of jurisdiction any time he chooses, up to the time the Board decides what the deficiency may be, merely by "believing the assessment or collection will be jeopardized by delay." Certainly a tribunal whose jurisdiction is so precarious and is limited by what one of the parties litigant may choose to "believe", is a long way from a court proper.

> "The contention of the plaintiff that, through the filing of a petition with the Board of Tax Appeals within 60 days after notice, he thereby obtained a stay until the final decision of the Board is untenable.

The plain intent and meaning of the provisions of section 274 and section 279 of the Revenue Act of 1926 is that, if a jeopardy assessment is made without notice, the Commissioner shall mail the notice within 60 days after making the assessment; that the taxpayer has 60 days after notice within which to file his petition with the Board of Tax Appeals but the pendency of his petition does not operate as a stay and the only manner in which a stay may be obtained is through filing the bond under section 279 (f) within 10 days after notice."

Abraham Salikoff v. Blakely D. McCaughn, Collector, D. C. E. D. Penna., No. 4265, Jan. 31, 1928.

VI.

WHAT WILL THE SUPREME COURT SAY WHEN ASKED TO REVIEW A DETERMINATION OF THE BOARD OF TAX APPEALS?

The dimensions and limitations of the Board, now fully understood, it will be pointed out what the Supreme Court had done when heretofore asked to take jurisdiction of appeals or petitions for review from tribunals powerless to render enforceable judgments. Without comment the leading case upon the question is cited below.

Act of Mar. 3, 1863, creating Court of Claims,—

The 7th section provides that in all cases of final judgment by the Court of Claims, or, on appeal, when affirmed by the Supreme Court, in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims * * *.

The 14th section provides that no money shall be paid out of the Treasury for any claim passed upon

by the Court of Claims, till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

The existence of this Court (Supreme Court) is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. No appeal is given from its decisions, *nor any power given to the legislative or executive departments* to interfere with its judgments or processes of execution * * *. The jurisdiction and judicial power being vested in the court, (Supreme Court) it proceeded to prescribe its processes and regulate its proceedings according to its own judgment, and *Congress has never attempted to control or interfere with the action of the court in this respect.* * * * Nor can Congress authorize or require this Court (Supreme Court) to express an opinion on a case where its judicial power could not be exercised, and *where its judgment would not be final and conclusive* upon the rights of the parties, and process of execution awarded to carry it into effect. * * *

It is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court *exercising independently* the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court. * * * The court has uniformly refused to take jurisdiction where there was not a court of the United States in existence, in possession of the original record, to which we were authorized by law

to send a mandate to carry into effect the judgment of this court.

Gordon v. U. S. per curiam judgment, Mar. 9, 1865, 69 U. S. 561, opinion by Taney, C. J., is found in 117 U. S. 697, published 1885.

Note—On Mar. 17, 1866 Congress repealed section 14, removing the restricted jurisdiction of the Court of Claims and the restricted appellate jurisdiction of the Supreme Court.

VII.

THE BOARD BY ITS OWN RULES RECOGNIZES THAT IT IS NOT A COURT.

By its rule numbered (2) two, the Board has provided—

"The following classes of persons whom the Board finds, upon consideration of their applications, to be of good moral character and to possess the requisite qualifications to represent others may be admitted to practice before the Board:

(a) Attorneys at law * * *.

(b) Certified public accountants duly qualified under the law of any State or Territory or the District of Columbia."

What does this court say to a proposal to have a direct review by a Circuit Court of Appeals (and ultimately by the U. S. Supreme Court) of questions of law in a proceeding which may not even have been conducted by attorneys at law. What will likely happen to the taxpayers? Granting to certified public accountants full credit for knowledge of the tax laws, how can it be expected that they will know the rules of evidence, legal procedure and how to protect themselves and their client

in the record. The writer now has a case tried before the Board by a most capable certified public accountant. A dreadful miscarriage of justice resulted. But on examination of the record it was found that not one single exception had been taken to the rulings of the Board on the admission and exclusion of evidence or to any other ruling. Thus no petition for review was possible,—there was nothing upon which to base it. What is the Supreme Court going to say when it is asked to take jurisdiction of a case tried by a civilian practitioner?

VIII.

CONCLUSION UNESCAPABLE.

By section 900 of the Revenue Act of 1926 it is specifically provided that

> "the Board of Tax Appeals is hereby continued as an independent agency in the Executive Branch of the Government."

Never, in the history of jurisprudence in this country, has there been such a thing as an appeal or a review direct from a branch of the executive department to a tribunal of exclusive appellate jurisdiction in the judicial department of our government. The only possible way to enforce, or, on the other hand, restrain the act of an executive official, if it be illegal, is by an appropriate procedure in a federal court of primary or original jurisdiction. But, it evidently was neither the design nor intent of Congress in creating the Board of Tax Appeals, to give them any greater jurisdiction than to merely temporarily stay the hand of the Commissioner from enforcing the collection of a tax by distraint and seizure of the taxpayer's property, until a hearing and decision on the merits could be had before the Board. The Board itself concedes this—

> *"The Board was created to give the taxpayer a*

chance to have an open and neutral consideration of his liability for a deficiency before he is required to pay. The harsh rule of payment first and litigation afterwards was sought to be mitigated." * * *

Appeal of Everett Knitting Works, 1 B. T. A. 6, Sept. 9, 1924.

The conclusion is therefore unescapable that no federal court of exclusive appellate jurisdiction can properly and legally entertain an appellate proceeding from this Board.

IX.

THE CONSTITUTION OF THE UNITED STATES READS.

ARTICLE III.

Sec. 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *.

Sec. 3. * * * In all other cases (except cases of original jurisdiction) before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, * * *.

The judicial interpretation of these particular sections of Article III of the Constitution is taken from Volume 11, Federal Statutes Annotated, Second Edition, pages 80, 81, 82 and 83.

"The Supreme Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

Gordon v. U. S., (1864) 117 U. S. 704 (Appendix).

"The courts have no general supervising power over the proceedings and action of the various administrative departments of government."

Keim v. U. S., (1900) 177 U. S. 293, 20 S. Ct. 574, 44 U. S. (L. ed.) 774, affirming (1898) 33 Ct. Cl. 174.

See also

Georgia v. Stanton, (1867) 6 Wall. 71, 18 U. S. (L. ed.) 721;

Astrom v. Hammond, (1842) 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596.

"*In reviewing the action of the Interstate Commerce Commission*, while the courts may review the question of the power of the commission to make an order in a particular case, they cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon some conception as to whether the administrative power has been wisely exercised."

Interstate Commerce Com. v. Illinois Cent. R. Co., (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280.

"Congress may provide for the review of the action of commissions and boards created by it, exercising only quasi-judicial powers, by the transfer of their proceedings and decisions, *denominated appeals for want of a better term*, to judicial tribunals for examination and determination *de novo*."

Stephens v. Cherokee Nation, (1899) 174 U. S. 477, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041.

"An Act of Congress, in order to carry out the provisions of a treaty, authorized the judgment of the superior courts established at St. Augustine and Pen-

sacola respectively to receive and adjust all claims arising within their respective jurisdictions agreeably to the provisions of the treaty, and by a further special law authorized the district judge of the United States for the northern district of Florida to receive and adjudicate the claims of certain persons. It was held that such a tribunal was not a judicial one and that the Act of Congress did not intend to make it one, nor were the powers exercised by the district judge judicial in their nature, and such a proceeding could not be reviewed by the United States Supreme Court."

U. S. v Ferreira, (1851) 13 How. 48, 14 U. S. (L. ed) 42.

See also

Muskrat v. U. S., (1911) 219 U. S. 346, 31 S. Ct. 250, 55 U. S. (L. ed.) 246.

"The Act of Congress creating the interstate commerce commission has not attempted to confer upon the courts nonjudicial functions. A court is not made, by the Act, the mere executioner of the Commissioners' order or recommendation so as to impose upon the court a nonjudicial power. A suit is, under the provisions of the Act, an original and independent proceeding in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo,* upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. 614.

X.

THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS OVER ORDERS OF THE FEDERAL TRADE COMMISSION, INTERSTATE COMMERCE COMMISSION AND FEDERAL RESERVE BOARD AS CONTRASTED WITH NO MENTION OF THE BOARD OF TAX APPEALS.

By the Act of February 13, 1925 (note that this more than eight months after Congress created the Board of Tax Appeals), the Judicial Code was amended to read as follows:

> "(e) The Circuit Courts of Appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914."
>
> *Sec. 128, J. C.* par fifth.

The significant part of this is nothing is said concerning any jurisdiction over the Board of Tax Appeals. Obviously, if particular and special legislation is necessary to confer appellate jurisdiction on the Circuit Court of Appeals to enforce, set aside or modify the orders of the Commissions and Boards named in this section 128, fifth (e), a similar particular and special act of Congress would be necessary to vest the Circuit Court of Appeals with appellate jurisdiction over the Board of Tax Appeals. This seems too plain for argument.

In contrast, note the correlated section of the Revenue Act of 1926—

> "Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.
>
> (b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

The significant thing is the omission of the word "enforce" and the further words "set aside". Perhaps this might be explained by saying that since the Board of Tax Appeals is powerless to enforce its own orders and determinations, it must follow per force that the appellate body above the Board of Tax Appeals would likewise be impotent to enforce its determinations.

XI.

NO CHANGE OF VENUE FROM THE BOARD OF TAX APPEALS.

Another most serious objection to the constitutionality of the acts and the enforcement of the determinations of the Board of Tax Appeals is the fact that some (12) twelve of the (16) sixteen members were former employees of the Bureau of Internal Revenue. And the Commissioner of Internal Revenue, the head of the Bureau, is always one of the parties litigant before the Board. There is no pro-

vision for a change of venue. It seems to be possible for a taxpayer to be required to try a case before a Board member (only one member hears cases except in extraordinary cases) who previously has ruled against the taxpayer while in the employ of the Commissioner. Certainly such a thing would nullify the action of a regularly constituted court. Moreover, it is a most cogent objection, especially when it is considered that the statute seems to contemplate that the review of Circuit Courts of Appeal shall be confined to questions of law, as held in *Avery v. Blair, Commissioner,* 5th C. C. A., Nov. 1, 1927, 22 Fed. (2nd) 6.

XII.

FAR FROM BEING A COURT.

It cannot be contended that, by the creation and continuance of the Board of Tax Appeals, Congress created, or intended to create a court. On the contrary, Congress expressly places the Board under the executive department of the government. The only party who is permitted to appeal is the complaining taxpayer and the only adverse party is the Commissioner. The Board cannot order or even consider the advisability of making others parties to the proceedings before it, and whose absence might, under a given state of facts, cause an entirely different decision to be made. Compare *Shield v. Barrow,* 7 How. 130. The Board cannot issue any equitable writs necessary to do complete justice; it cannot order an accounting; it cannot martial assets; it cannot cancel deeds or other written instruments, the cancellation of which may be absolutely necessary to complete justice. In short, it can in no way function as a court either of law or equity. Yet it is now proposed that there may be an appeal or petition for review,—call it what you like,—direct from this executive agency in the government to an appellate court in the

judicial department. The one single solitary function of this Board is to determine the correct amount of the tax, and not one step beyond that can it go. It gives the Commissioner no aid in collection, nor does it give the taxpayer any aid if it determines a refund.

XIII.

ALREADY THE SUPREME COURT HAS MADE A STRONG INTIMATION OF ITS VIEWPOINT.

While this court has not said so in so many words, the language used in the case of *Williamsport Wire Rope Company v. United States,* number 337, October 1927 Term, decided June 4, 1928, 277 U. S. 551, strongly impels the conclusion that the United States Board of Tax Appeals is recognized to be nothing more than a branch of the executive department of the government. For convenience, the relevant portion of that decision is cited as follows—

> It is true that, unlike the Committee (on appeals and review) the Board of Tax Appeals is not a part of the Bureau of Internal Revenue. The Board is an independent agency. But by specific provision of the Revenue Act of 1924, c. 234, No. 900 (k), 43 Stat. 253, 338, it was defined as an agency "in the executive branch of the Government." Compare *Goldsmith v. Board of Tax Appeals,* 270 U. S. 117, 121-122. *Its sole function* consists in reviewing, on appeal, determinations of the Commissioner under the revenue laws. The fact that the Commissioner is a party to all cases before it enables the Board, by rules of procedure which it has developed, to leave to the Commissioner the initial determination of many questions requiring the use of facts not in the record. Its limited, specialized functions enable its members to acquire the extensive special knowledge and the specific experience essential to a sound exercise of judgment in dealing

with questions arising under Nos. 327 and 328. As was said in the *Oesterlein case, supra,* at p. 226, there is no reason for thinking that Congress considered the Commissioner to be better qualified for making determinations under Nos. 327 and 328 than this administrative agency specially established to review his decisions.

XIV.

TO ASSUME JURISDICTION WILL MAKE THE DECISIONS OF THIS COURT UTTERLY IRRECONCILABLE.

In *Blair, Commissioner v. Oesterlein Machine Company,* 275 U. S. 220, (1927), this court said, in effect that the Board of Tax Appeals did have jurisdiction to hear an appeal from the determination of the Commissioner under Sections 327 and 328 of the 1918 Revenue Act. In *Williamsport Wire Rope Company v. United States,* (1928), 277 U. S. 551, this court affirmed that conclusion but went on to say that a federal court had no jurisdiction in such cases whatsoever, since determinations under these particular sections were discretionary with the Commissioner, subject only to an appeal to the Board. If that be true, how, then, can there be a review by an appellate federal court of a decision by the Board of Tax Appeals in a case involving sections 327 and 328. The reasoning of this court for lack of jurisdiction in Williamsport will apply with equal force and effectiveness when a case like Oesterlein, for instance, comes before it by way of the Board of Tax Appeals. And if there can be no review by this court from a decision of the Board in a section 327 and 328 case. how can there be a distinction made in cases involving other sections of the Revenue Acts. The statute makes no distinction whatsoever.

XV.

All that has been said heretofore applies with equal relevancy to cases which were appealed to the Board under either the 1924 Act or the 1926 Act. But the two acts are distinctly different. Sections 283 (b) and 283 (f) (set forth on pages 7 and 8 of the Solicitor General's brief) of the 1924 Act, specifically provide that a taxpayer's right to pay and then institute suit to recover shall not be forfeited by an appeal to the Board. And it has twice been so interpreted by the District Courts,—first, in *Emery v. U. S.*, 27 F. (2nd) 992, (one of the writer's cases) and again in *Old Colony R. Co. v. U. S.*, 27 F. (2nd) 994, (Mass.). So, if this court takes jurisdiction and decides the issues herein, the taxpayer will then pay his tax, institute suit for recovery and, with a jury trial, the result might easily be the converse. And further, this same identical case might thus come to this court a second time under a record upon which the former decision would have to be reversed.

XVI.

ON THE SUBJECT OF CONFUSION AND EXPEDIENCY.

In the brief of the learned Committee of the American Bar Association, it is pointed out that a denial of jurisdiction will result in much confusion and that present results have been satisfactory (p. 5). Consider then for a moment what is happening right now in our courts,—what actually did happen in the *Emery v. U. S.* case, cited *supra*. The taxpayer claimed a refund and the Commissioner claimed additional tax. The taxpayer instituted suit in the District Court for his refund and the Commissioner concurrently determined a deficiency of a vast amount of additional tax. From this determination of the Commissioner the taxpayer appealed to the Board of Tax Appeals, which

eventually held there was no additional tax due. Thereupon the taxpayer renewed his suit for refund in the District Court and was awarded a judgment. The Commissioner's counsel did not appeal therefrom, but subsequently did file a petition for review of the decision of the Board of Tax Appeals in the Circuit Court of Appeals for the Third Circuit. Thus we have the same controversy pending in two different courts with a possibility that one court may be obliged to decide one way and the other court, with an utterly different record before it, will be obliged to decide the other way. And the Third Circuit Court of Appeals might find itself in the anomalous position of having to decide the suit for refund, when it is reached, entirely opposite to the decision on appeal from the Board of Tax Appeals. Shall we say that such a result is satisfactory? And could there be greater confusion and chaos?

Respectfully submitted,

JAMES WALTON,

Amicus Curiae by leave of the Court.

Pittsburgh, Penna.,
February 11, 1929.